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Nova Plumbing, Inc. and Southern California Pipe Trades District Council No. 16, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Case 21–CA–32275

September 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On May 10, 1999, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Resolution of the unfair labor practice allegations in this case requires us to examine whether the bargaining agreement entered into between the Union and the Respondent established an 8(f) or 9(a) relationship. Applying the test set forth in our recent decision in *Central Illinois Construction*, 335 NLRB No. 59 (2001), we hold that the collective-bargaining agreement entered into between the parties unequivocally established that the Union attained the status of majority bargaining representative under Section 9(a). Therefore, we find that the Respondent's withdrawal of recognition from, and refusal to meet with, the Union, as well as the Respondent's cessation of contributions to certain contractually-established funds and use of the Union's referral system violated Section 8(a)(5) and (1) of the Act.

Facts

The Respondent is a construction industry employer engaged in the business of residential plumbing since 1994. Prior to 1994, Rodney Robbins, the Respondent's president, served as vice president of Calta, a plumbing contracting company owned by Robbins' father. Calta recognized the Southern California Pipe Trades District Council No. 16, United Association of Journeymen and

Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the Union), as the representative of its employees and had a contract with the Union when Calta was an operating business. When Calta ceased operations, the Respondent opened its business, hiring many former Calta employees.

In October 1995, the parties entered into an agreement (the Agreement). The Agreement included a master labor agreement (the MLA) and a residential addendum agreement (the Addendum).¹ The MLA is a collective-bargaining agreement between various contractors and the Union. The MLA contains recognition language that provides that, based on independently verified evidence presented to the covered contractor demonstrating that the Union represents an uncoerced majority of the contractor's employees, the contractor recognizes the Union as the sole and exclusive collective-bargaining representative of all employees of the contractor performing plumbing and piping work. The MLA contains a signature page, signed by Robbins. The addendum, also signed by Robbins, provides that the Agreement "shall remain in full force and effect through June 30, 1997 and shall be extended only by the written agreement of the parties."

On May 9, 1997, the Respondent sent the Union a letter stating that it was terminating the Agreement effective June 30, 1997, and that it had no obligation to bargain for a successor agreement. The Union sent the Respondent a letter dated May 12, 1997, requesting bargaining for a new agreement. The parties agreed to a 60-day extension of the Agreement. Thereafter, the Respondent informed the Union that it would not agree to any further extensions and would not continue bargaining. The Respondent also stopped contributing to certain contractually established trust funds and ceased using the Union's hiring hall referral service. When the Respondent withdrew recognition, it had approximately 100 employees.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive bargaining representative, by ceasing to contribute to certain contractually-required trust funds, by ceasing to use the Union's hiring hall referral service, and by failing and refusing to meet and bargain with the Union.

Judge's Decision

The judge determined that the Respondent did not violate the Act by withdrawing recognition and refusing to bargain with the Union, and he dismissed the 8(a)(5)

¹ The parties agree that this agreement began the bargaining relationship involved herein. No one argues that it began under Calta.

complaint. In doing so, the judge assumed, without deciding, that the Agreement created a 9(a) relationship between the Respondent and the Union. The judge determined that the Respondent possessed, at all material times, a good-faith doubt that a majority of unit employees did not support the Union.² The judge credited testimony by Robbins and the Respondent's foremen and superintendents that the judge found sufficient to establish that the employees did not support the Union and did not desire union representation. Therefore, the Respondent was privileged to withdraw recognition and to cease bargaining with the Union when the Agreement expired.

The Parties' Contentions

The parties disagree as to the nature of their relationship. The General Counsel argues that Section 8(f) does not control the parties' relationship and that the Union is the exclusive 9(a) representative of the unit employees. Specifically, the General Counsel contends that the Agreement's language shows that the Union demanded 9(a) recognition and that the Respondent voluntarily granted such recognition. The General Counsel also claims that Section 10(b) precludes the Respondent from questioning whether the Union enjoyed majority status when the Respondent signed the Agreement.

According to the General Counsel, testimony regarding the employees' disaffection with the Union at the time of the Agreement's formation is irrelevant to whether the Union possessed majority support when the Agreement expired. The General Counsel also argues that the Respondent's claim of a good-faith uncertainty regarding the Union's support is an after-the-fact defense and that the Respondent's real reason for withdrawal of recognition is because the Union did not organize the Respondent's competitors.

The Respondent argues that the Union never demanded 9(a) recognition and that the Respondent did not intend to enter into a 9(a) relationship. Rather, the Respondent contends that the Agreement created a 8(f) relationship and, therefore, the Respondent was free to withdraw from the Agreement when it expired. Alternatively, the Respondent argues that, if Section 9(a) governs its relationship with the Union, at no time, past or present, did the Union ever enjoy majority status. To support this claim, Respondent relies on testimony by Robbins and certain superintendents and managers that the employees did not support the Union at the time the

Respondent signed the Agreement and that they expressed displeasure with the Union throughout the duration of the Agreement. The Respondent claims that, because it possessed a good faith uncertainty regarding the Union's majority support, it could withdraw from the Agreement at any time.

Discussion

1. 9(a) Status

We find, based on the standards set forth by this Board and the courts, that the parties' collective-bargaining agreement unequivocally shows that they intended to create a 9(a) relationship. We also find, in disagreement with the judge, that the Respondent did not have a good-faith uncertainty of the Union's majority status. Accordingly, we find that the Respondent violated the Act as alleged.

The standards set by the Board in *Central Illinois Construction*, supra, govern the Board's determination of whether the parties intended through their contract to create a 9(a) relationship. In *Central Illinois Construction*, the Board explicitly adopted the standards articulated by the United States Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000). Those standards provide that the parties' recognition agreement or contract will independently be sufficient to establish the union's 9(a) status where the language unequivocally indicates that (1) the union requested recognition as the majority or as the 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or as the 9(a) representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support. 335 NLRB No. 59, slip op. at 4.

The full text of the parties' recognition clause here states as follows:

Based upon evidence presented to the Contractor by the Union, which evidence demonstrates that the Union represents an uncoerced majority of the employees of the Contractor, and which has been independently verified by a Certified Public Accounting firm satisfactory to the Contractor, the Contractor hereby recognizes the Unions who are signatory hereto as the sole and exclusive collective bargaining representative of all employees of the Contractor performing Plumbing and Piping work as defined in this Agreement.

Reading this provision as a whole leaves no reasonable doubt that the parties intended a 9(a) relationship. It

² In his decision, the judge phrases the test as whether the Respondent had a good-faith "doubt" that the Union represented a majority of its unit employees. The proper test, however, as set forth in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), is whether the Respondent had a good faith "uncertainty" about whether the Union enjoyed majority support. See *id.* at 367.

clearly meets the standards set forth by the Board in *Central Illinois*. Although it does not specifically state that the Union requested recognition, it states that the Respondent granted recognition based upon evidence submitted by the Union. This clearly indicates that the Union requested recognition from the Respondent. See *Central Illinois*, slip op. at 4. It also clearly states that the Respondent recognized the Union as the majority representative. And it specifically states that the recognition was based on evidence submitted by the Union to the Respondent that the Union represents a majority of the employees. Thus, under the standards explicated in *Central Illinois*, the parties have clearly set forth their intent to create a relationship authorized by Section 9(a) of the Act.

Based on dicta in *Central Illinois*, however, our colleague faults the parties for stating that the evidence submitted by the Union and accepted by the Respondent was evidence that the Union *represented* a majority of the employees, rather than evidence that the Union *had the support of* or *was authorized* to represent a majority. In the context of the entire recognition provision, our colleague's parsing of its language clearly exalts form over substance. The provision explicitly states that a certified public accounting firm has verified that the Union in fact represents an uncoerced majority of the Respondent's employees. This statement linking the assertion of majority representation with verification of the evidence establishing majority representation has no apparent meaning, in a legal or practical context, other than that the Respondent has verified to its satisfaction that the Union has majority support. What other purpose, apart from establishing proof of a 9(a) relationship, would explain the reference to verification of evidence of majority? It does not matter whether the Union has attained majority support if the only relationship the parties were seeking was an 8(f) relationship. *Triple C Maintenance, Inc.*, 219 F.3d at 1155 (Sec. 8(f) allows an employer primarily engaged in the building and construction industry to enter into prehire agreements containing union-security clauses regardless of whether the union represents a majority of the employer's employees.).

Our colleague claims that a reasonable interpretation of the language "independently verified" is that an independent source verified that the Union merely represents the employees, not that the Union represents a majority of the employees. That interpretation is not only strained, it is absurd. What possible purpose would be served by having a certified public accounting firm ver-

ify merely that the Union "represents" the employees?³ There is no ambiguity regarding each party's intent, and we fail to understand how this provision can be interpreted to mean anything other than that the Union has unambiguously demanded recognition as the employees' 9(a) representative and the Respondent has unambiguously accepted it as such.⁴

In *Central Illinois*, the Board explicitly accepted the standards set by the Tenth Circuit for determining whether parties, by their contract language, intended to establish a 9(a) relationship. See *Central Illinois*, slip op. at 4, citing *NLRB v. Triple C Maintenance, Inc.*, supra, and *NLRB v. Oklahoma Installation Co.*, supra. Nowhere in those two decisions does the Tenth Circuit state that the failure of the parties' contract to use certain words is fatal to a finding that the parties intended to create a 9(a) relationship regardless of the intent shown by other wording in their agreement. To the contrary, the court held that the absence of any specific reference to Section 9(a) is not fatal if the rest of the agreement conclusively notifies the parties that a 9(a) relationship is intended. *Oklahoma Installation Co.*, 219 F.3d at 1165; *Triple C Maintenance, Inc.*, 219 F.3d at 1155. See also *Sheet Metal Workers International Association Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 242 (3d Cir. 1999). The reasoning of the Third Circuit in *Sheet Metal Workers*, which the Tenth Circuit specifically adopted in *Triple C Maintenance, Inc.*, 219 F.3d at 1155, is particularly illustrative of this approach. As in this case, the parties' contract provided that the union "represents" a majority of the employees rather than saying that it has the "sup-

³ Our colleague vainly tries to analogize the situation to that presented in *Oklahoma Installation Co.*, 219 F.3d at 1165, where the court explained that the phrase "the union has submitted . . . that [it] represents a majority" could logically be read as simply meaning that the union asserted that it represents a majority. That interpretation will not work here, however, because the Union did not merely "represent" that it represents the employees, as our colleague would have it. Rather, the Union stated that "evidence demonstrates" that the Union represents an uncoerced majority and a certified public accounting firm confirmed that evidence. The Union does not need a certified public accounting firm to prove that it simply said, or asserted, that it represents the employees, and no one could reasonably assume that the Union would engage such a firm to do something so pointless.

⁴ Bright line rules must be applied using common sense. Requiring the parties to have certain "magic words" in their agreement, however, as a prerequisite to finding that the agreement creates a 9(a) relationship, while ignoring the parties' intent as reflected by a review of the other contract terms and provisions read as a whole, does a disservice to the parties by frustrating their true intent and unnecessarily upsetting the stability of their relationship. Our colleague should heed the words of former Member Johansen, dissenting in *J & R Tile*, 291 NLRB 1034, 1038 (1988), where he warned against applying an analysis for determining whether a contract creates a 9(a) relationship that "exalts form over substance and imposes on the construction industry a standard of legal punctiliousness that we in the legal profession should eschew."

port” of a majority, and the contract did not directly reference Section 9(a). The court found that the parties had nonetheless made clear that they intended a 9(a) relationship. This was because the contract provided, in conjunction with the statement that the union represented a majority of the employees, that the employer recognized the union until the union loses its status as the employees’ exclusive representative as a result of an NLRB election. See *Herre Bros., Inc.*, 201 F.3d at 242. Likewise, in this case, even though the contract uses the word “represents” rather than the magic words preferred by our colleague, it clearly states that the evidence that the Union “represents” a majority was verified by a certified public accounting firm. Considering all the words of the provision, as the court did in the *Sheet Metal Workers* case, there can be no doubt that it was intended to create a 9(a) relationship, despite the fact that it used the word “represents” rather than other, more specific language. In attempting to discern the parties’ intent, the approach of the Tenth and Third Circuits, and thus of the Board, is to avoid fixation on the presence or absence of certain words, and the application of arbitrary or overly technical rules of contract interpretation. By holding that the parties have failed to meet his exacting standards of terminology in this case, our colleague has fallen into that very trap.

For the above reasons, we find that the parties’ contract cannot reasonably be construed as creating an 8(f) relationship, and find instead that it unequivocally indicates that the Union attained 9(a) status. Accordingly, we find that when the Respondent signed the parties’ agreement on October 17, 1995, a 9(a) relationship was created.

2. Respondent’s failure to establish good-faith uncertainty of Union’s majority support

By proving that the Respondent recognized the Union as a 9(a) representative, the Union enjoys a rebuttable presumption of support from a majority of bargaining unit employees. See *Pekowski Enter, Inc.*, 327 NLRB 413, 426 (1999). When the collective-bargaining agreement ends, the presumption of majority status becomes a rebuttable one. *Auciello Iron Works, Inc.*, 517 U.S. 781, 786 (1996). The Respondent can overcome this presumption by showing that the employer, at the time of its refusal to bargain, had a good-faith uncertainty, “founded on a sufficient objective basis,” of the Union’s majority support. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

While this case was pending, the Board issued *Levitz*, 333 NLRB No. 105 (2001), in which the Board “reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally

from an incumbent union.” In that case, the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), insofar as it permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith uncertainty of the union’s continued majority status. In *Levitz*, the Board held that “an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees.” However, the Board also held that its analysis and conclusions in that case would only be applied prospectively. “[A]ll pending cases involving withdrawals of recognition [will be decided] under existing law: the ‘good faith uncertainty’ standard as explicated by the Supreme Court” in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). Thus, in evaluating the Respondent’s assertion of good-faith uncertainty, we will apply the standard set forth in *Allentown Mack*. In that case, the Supreme Court explained that “doubt” meant “uncertainty,” so that the test is phrased in terms of whether the employer “lacked a genuine reasonable uncertainty about whether [the Union] enjoyed the continuing support of a majority of unit employees.”

In *Allentown Mack*, the Supreme Court found that the evidence supported the respondent’s assertion of its good-faith doubt of majority support. Such evidence consisted of: (1) a statement by the union’s steward to the respondent’s manager that the union lacked majority support; (2) a concession by the union that reliable information showed that 7 of the 32 unit employees did not support the union; (3) a statement by an employee that “he was not being represented for the \$35 he was paying;” and (4) a statement by employee Bloch to a manager that the entire night shift did not want the union. In crediting the statements, the Court stated that:

[u]nsubstantiated assertions that other employees do not support the union certainly do not establish *the fact of that disfavor* with the degree of reliability ordinarily demanded in legal proceedings. But . . . it is not the fact of disfavor that is at issue . . . but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact. On that issue, absent some reason for the employer to know that Bloch had no basis for his information, or that Bloch was lying, reason demands that the statement be given considerable weight.

Id. at 369–370. (emphasis in original). The Court also found good reason for the Respondent to give “great credence” to the union steward’s assertion that the union lacked support as he was “not hostile to the union and was in a good position to assess antiunion sentiment.” Id. at 371.

The Court concluded that the evidence was sufficient for the respondent to develop a good faith uncertainty about the union's status.

In the instant case, the evidence that the judge found to support the Respondent's assertion of a good-faith doubt is easily distinguishable from the evidence supporting the employer's position in *Allentown Mack*. Unlike the evidence in *Allentown Mack*, which identified specific employees who disfavored union representation, the evidence in the present case is vague and fails to provide the identity of the employees who allegedly expressed their dislike for Union representation. The information is also stale. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 778 (evidence of employee disaffection must be close in time to the withdrawal of recognition); *Auciello Iron Works, Inc.*, 517 U.S. at 786–787 (same).

The Respondent presented evidence from its president Rodney Robbins, who made the decision to withdraw recognition, six of its superintendents and foremen, and Robbins' stepmother Gerry Robbins, who is the Respondent's office manager. Robbins testified that his information regarding the employees' purported lack of interest in being represented by the Union came from these seven individuals rather than directly from the other unit employees, and therefore we must examine the information regarding employee sentiment that these seven individuals passed on to Robbins.

Superintendent Eckroth admitted that he never even told Robbins of his conversations with his crew. Furthermore, his testimony was vague (he merely testified that he could not remember any employees "jumping at the chance" to join the Union), and he was unable to name any specific employee he had spoken with or relate any specific conversations. Superintendent Saldana left the Respondent's employ in February 1997, almost 5 months before the Respondent withdrew recognition. Saldana admitted that the information regarding employee feelings toward the Union was conveyed to Robbins in late 1995. Thus, this information was clearly stale, especially since there was approximately a 50 percent employee turnover rate between late 1995 and early 1997. In his testimony he also merely claimed that the employees told him that they did not want to join the Union because they did not want to pay dues. The Board has held that employee statements that they do not want to pay union dues do not establish that the employees do not wish to be represented by a union. *R.J.B. Knits*, 309 NLRB 201, 206 (1992). Foreman Banks testified that he had spoken with only six or so employees concerning their feelings toward the Union,⁵ and could say only that

they did not want to be in the Union, rather than that they did not want the Union to represent them. Further, he was unsure whether he had even passed this information on to Robbins. Foreman Leonardo's testimony concerning employee sentiments toward the Union was based on conversations with employees in 1995, and thus was stale. His testimony was merely that three employees did not want to join the Union because they did not want to pay dues. Foreman Hall's testimony involved conversations with employees in late 1995 and early 1996, and therefore was once again stale. Hall also did not mention whether he had provided this information to Robbins. Foreman Thomas admitted that he had not talked with employees since the contract was signed in October 1995, and thus his information was stale as well. Finally, Office Manager Gerry Robbins testified that the employees she had talked with merely asked her why they had to join the Union. She did not testify that the employees said that they did not want the Union to represent them.

Robbins' testimony that he believed that the employees did not support the Union gives little credence to the Respondent's claim of a good-faith uncertainty. Unlike the union steward in *Allentown Mack*, whose testimony concerning lack of union support constituted a statement against the Union's own interest, Robbins, as the Respondent's president, provided self-serving testimony that supported the Respondent's interest, i.e. the desire to withdraw recognition. Thus, the Respondent's evidence that it possessed a good-faith uncertainty of the Union's majority status consists of unsupported generalities, stale expressions of sentiment and self-serving testimony that lacked the corroborative detail found in *Allentown Mack*.

Further, the Respondent's conduct when it withdrew recognition undermines its assertion that the basis for its behavior was a good-faith uncertainty concerning the Union's majority status. At the time of its withdrawal, the Respondent asserted that its reason for withdrawing was a steadfast belief that it had the right to do so under Section 8(f). Given the Respondent's denial of a 9(a) relationship with the Union, the Respondent's assertion of a good-faith uncertainty is, at best, an after-the-fact fabricated defense. In other words, if the Respondent disputed the fact that it had a 9(a) relationship with the Union, then the Respondent never had to question whether the Union enjoyed majority support.

In sum, the Agreement entered into between the Respondent and the Union created a 9(a) relationship. As such, absent a showing of good-faith uncertainty regarding majority support for the Union, the Respondent could not withdraw recognition and repudiate the Agreement. Because the evidence is insufficient to support a finding of a good-faith uncertainty concerning the Union's ma-

⁵ The approximate size of the unit is 100 employees.

jority status, we find that the Respondent's withdrawal of recognition from, and its refusal to bargain with, the Union, as well as its cessation of contributions to certain contractually-established trusts and its cessation of use of the Union's hiring hall services, violated Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Since October 17, 1995, the Union, pursuant to Section 9(a) of the Act, has been the exclusive bargaining representative of the Respondent's employees who perform piping and plumbing work.

3. By withdrawing recognition from the Union, refusing to bargain with the Union, and unilaterally ceasing application of the terms and conditions set out in the collective bargaining agreement, including those requiring contributions to certain contractually-established trust funds and utilization of the union hiring hall referral services, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The violations are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and, on request, to bargain with the Union as the exclusive bargaining agent of its plumbing and piping employees. We shall also order the Respondent, on request by the Union, to rescind changes in employment terms made after June 30, 1997, restoring those employment terms to levels that existed prior to that date. As to those employment terms for which rescission is requested and restoration occurs, the Respondent shall be ordered (1) to make whole all unit employees for any loss of wages and other benefits suffered, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); (2) to make whole any fringe benefit funds in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979); (3) to reimburse employees for any losses or expenses they may have incurred because of its failure to make payments to those funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), with interest computed in the

manner prescribed in *New Horizons for the Retarded*; and (4) to offer immediate and full employment to those applicants who would have been referred to the Respondent for employment through the Union's hiring hall were it not for the Respondent's unlawful conduct, and to make them whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's failure to hire them, as provided in *J.E. Brown Electric*, 315 NLRB 620 (1994). Backpay is to be computed in a manner consistent with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *New Horizons for the Retarded*. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage. *J.E. Brown Electric*, 315 NLRB 620 (1994).

ORDER

The Respondent, Nova Plumbing, Inc., Santa Ana, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Southern California Pipe Trades District Council No. 16, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO as the exclusive representative of its bargaining-unit employees.

(b) Failing to bargain with the Union as the exclusive representative of bargaining unit employees by unilaterally ceasing the application of the terms and conditions set out in the collective-bargaining agreement, including those requiring contributions to certain contractually established trust funds and requiring utilization of the Union hiring hall referral services.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and bargain collectively in good faith with the Union as the exclusive bargaining representative, pursuant to Section 9(a) of the Act, of its unit employees. The appropriate unit is:

All employees of the Contractor performing plumbing and piping work.

(b) Upon request of the Union, restore the terms and conditions of employment which were in effect and applicable to employees in the bargaining unit prior to the Respondent's termination of the collective-bargaining agreement on June 30, 1997.

(c) Make whole the unit employees for any loss of pay and benefits suffered as a result of the Respondent's failure to abide by the terms of the collective-bargaining agreement with the Union, in the manner set forth in the remedy section of this decision.

(d) Make whole, with interest, those employees who would have been referred for employment through the Union's referral system and employed by the Respondent but for the unlawful unilateral changes in terms and conditions of employment that it made on June 30, 1997.

(e) Make whole all fringe benefit funds for any losses they may have suffered as a result of the unilateral modification of terms and conditions of the collective bargaining agreement in the manner prescribed in the remedy section of this decision.

(f) Preserve, and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's Order.

(g) Within 14 days after service by the Region post at its Santa Ana, California location copies of the attached notice marked Appendix.⁴ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1997.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 30, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

I conclude that the General Counsel has not established a 9(a) relationship. In the construction industry, absent evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a). The distinction between an 8(f) and a 9(a) relationship is quite significant. Under an 8(f) contract, a union enjoys no presumption of majority status, and either party may repudiate the relationship upon the expiration of the contract. See *Deklewa & Sons*, 282 NLRB 1375 (1987). However, under a 9(a) contract, an employer has a duty to bargain after the contract expires. *Id.*

The burden of proving a 9(a) relationship is on the party asserting such a relationship. This burden may be met in two ways: The party either may win a Board-certified election or it may obtain the employer's voluntary recognition of the union as the employees' exclusive majority-supported bargaining agent. With regard to the latter approach, a written contract containing clear recognition language can establish 9(a) bargaining status.

In *Central Illinois Construction*, 335 NLRB No. 59 (2001), the Board recently discussed the minimum requirements that a written recognition agreement or contract clause must meet in order for a union to attain 9(a) status solely on the basis of such an agreement. In that case, the Board adopted the requirements stated by the United States Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000) and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000). Thus, the Board held that a recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language "unequivocally" indicates that: (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support. *Id.*, slip op. at 4.

The contract at issue in *Central Illinois Construction* contained a recognition provision stating that the respondent employer “recognize[s] [the union] as the Majority Representative.” However, the provision did not state that the respondent’s recognition was based on a contemporaneous showing, or offer by the union to show, that the union had majority support. Applying the test set forth above, the Board concluded that the contract language was insufficient to establish a 9(a) relationship. The Board also provided additional guidance as to what language would be considered sufficient to establish 9(a) status. Regarding statements in contracts claiming majority support, the Board examined a contractual statement providing that the union “represents” a majority of unit employees. The Board reasoned that such language would be accurate under either an 8(f) or 9(a) agreement and concluded that such language does not conclusively establish a 9(a) relationship. *Id.* Further, the Board specifically overruled *Oklahoma Installation Co.*, 325 NLRB 741 (1988), and other precedent that find Section 9(a) status based on an agreement indicating that the union “represents a majority.”

In the case at hand, the MLA states that “the Union represents an uncoerced majority of the employees of the [Respondent].” According to *Central Illinois Construction*, however, such language is insufficient to overcome the presumption that the parties’ bargaining relationship operated under Section 8(f). Further, the language in the MLA, i.e., “evidence [which demonstrates] that the Union represents an uncoerced majority . . . has been independently verified,” is not sufficient to establish that the Union has shown, or offered to show, majority status. The critical question is “whether the Agreement unequivocally and unambiguously illustrates that the parties intended to be governed by Section 9(a) rather than Section 8(f).” *Oklahoma Installation*, 219 F.3d at 1164.

In *Oklahoma Installation*, the United States Court of Appeals for the Tenth Circuit examined a representation agreement providing that “the Union has submitted, and the employer is satisfied, that the Union represents a majority of its employees . . .” *Id.* at 1165. The court rejected the argument that the word “submitted” meant that the Union in fact submitted proof of majority support. The court stated that another logical reading of that word was that the Union *asserted* that it represented a majority, and the court therefore concluded that the term “submitted” only heightened the ambiguity of the recognition agreement. *Id.* Likewise, in the case at hand, the term “independently verified” does not provide unequivocal evidence of a 9(a) relationship. A reasonable interpretation of that language is that an independent source verified the union representation of the employ-

ees, but not the Union’s claim that it had the support of, or authorization by, a majority of employees.

Although, as noted, I do not insist upon “magic words,” I do insist, as does *Central Illinois*, upon a lack of ambiguity.¹ In my view, there is an ambiguity here. The language speaks of “evidence that the Union represents an uncoerced majority of employees.” However, as discussed above, that is not the same as evidence that the Union made “a clear showing of majority support.”² The language in the instant case goes on to state that this “evidence” was “presented to the Contractor and was independently verified.” However, since the “evidence” is not a majority showing, it is of no moment that it was presented to the contractor or independently verified. It may be less than clear how “Union representation” can be “presented” and “verified.” But, this only highlights the ambiguity of the language.

My colleagues state that: “It does not matter whether the Union has attained majority support if the only relationship the parties were seeking was an 8(f) relationship.” I agree. The contract here does not speak of majority support and thus is consistent with an 8(f) relationship.

In sum, if a union can establish actual majority support, or if it can point to language which provides that it had majority support, it can be the 9(a) representative. The critical issue is whether a majority of the employees chose the union. The issue is not whom the union represents. If the employees did not choose the union, we should not risk foisting a 9(a) union on the employees.

Based on all of the above, I find that the Union and the Respondent did not have a 9(a) relationship. Thus, it is of no significance whether the Respondent had a good-faith uncertainty as to the Union’s majority status.

¹ See *Central Illinois*.

² This was the language of *Triple C Maintenance*, where Section 9(a) status was found. In that case, the Tenth Circuit approved the reasoning of the United States Court of Appeals for the Third Circuit in *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 239 (3d Cir. 1999). The Third Circuit said that the agreement there “recites that the Union submitted proof and that the employer is satisfied that the union represents a majority based on that proof.” There is no comparable language in the instant case.

Because I find that the relationship was governed by Section 8(f), the Respondent did not violate Section 8(a)(5) when it withdrew recognition, refused to bargain, and terminated trust fund contributions after the contract expired. I would dismiss the complaint.

Dated, Washington, D.C. September 30, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT withhold recognition from and fail and refuse to bargain with the Southern California Pipe Trades District Council No. 16, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive representative of our employees in the following appropriate bargaining unit:

All employees of the Contractor performing plumbing and piping work.

WE WILL NOT fail to bargain with the Union as the exclusive representative of bargaining unit employees by unilaterally ceasing the application of the terms and conditions set out in the collective-bargaining agreement, including those requiring contributions to certain contractually established trust funds and requiring utilization of the Union hiring hall referral services.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union and put in writing and sign an agreement reached on terms and conditions of employment for employees in the following unit:

All employees of the Contractor performing plumbing and piping work.

WE WILL, on request of the Union, rescind any changes from terms and conditions of employment that existed before June 30, 1997, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about June 30, 1997.

WE WILL offer immediate and full employment to those applicants who would have been referred for employment by the Union were it not for our unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them.

NOVA PLUMBING, INC.

John Kloosterman, Atty., for the General Counsel.

Steven D. Atkinson and Thomas A. Lenz, Attys., (Atkinson, Andelson, Loya, Ruud & Romo) of Cerritos, California, for the Respondent.

Jeffrey L. Cutter, Atty., (Wohlner Kaplon Phillips Young & Barsh), of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on December 14 through 17, 1998 in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 21 of the National Labor Relations Board on March 31, 1998, based on charges filed on September 18, 1997, by the Southern California Pipe Trades District Council No. 16, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Charging Party or the Union) against Nova Plumbing, Inc. (Nova or the Respondent).

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), on and after June 30, 1997, by (a) withdrawing recognition of the Union as the exclusive collective-bargaining representative of a unit of the Respondent's employees, (b) ceasing to contribute to contractually established health, vacation and holiday trusts and, (c) failing and refusing to meet and bargain with the Union on behalf of unit employees.

The Respondent admits that it undertook the actions alleged. It avers, however, that at least as of the June 30, 1997 expiration of the contract, it was not obligated to: (1) continue to recognize the Union as the representative of its unit employees, (2)

bargain with the Union respecting those employees or (3) continue to make contractually provided for fringe benefit contributions and, therefore, its conduct did not violate the Act as alleged.

FINDINGS OF FACT

Upon the entire record, including helpful briefs from the General Counsel and the Respondent, I make the following findings of fact.

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Santa Ana, California, has at all times material been a plumbing subcontractor in the construction industry in the State of California. During its business operations, the Respondent has annually enjoyed revenues in excess of \$500,000, and during the same periods has purchased and received goods at its California locations valued in excess of \$50,000 from other enterprises located within the State of California, each of which other enterprises has received these goods directly from points outside the State of California.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer in the construction industry engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent was formed and commenced business operations in 1994. At all times its president has been Mr. Rodney Robbins. Mr. Rodney Robbins' father in the years previous to the Respondent's creation operated a plumbing contractor company, Calta. During those prior years Mr. Rodney Robbins served as the vice president of Calta. Calta recognized the Union as representative of its employees and had a contract with the Union during its life but ceased operations at about the time Nova commenced business. When Nova started it hired many employees from the Calta operation.

B. The Events of 1995

The Union sought recognition from and bargaining with Nova in late 1994 and by early 1995 the parties were in substantial disagreement. The Union contractual fringe benefit trusts were threatening litigation against Nova predicated on a relationship between Calta and Nova and Nova had filed a RM petition with the Board. Negotiations were conducted between the parties resulting in a global resolution which included a collective bargaining agreement being signed, the Union's threat to file trust litigation being withdrawn and the NLRB representation petition being withdrawn. Substantial dispute existed among witnesses respecting oral agreements and assertions made during the parties' negotiations regarding Nova's right to abandon its relationship with the Union if it did not organize Nova's business competitors and whether or not the

Union in obtaining recognition from and a contract with Nova was asserting it represented a majority of unit employees. Nova's President Robbins signed various contractual documents on October 17, 1995. The documents signed by Nova included a master agreement—there is some dispute respecting the specifics—and a residential addendum agreement. The residential addendum agreement signed by Robbins asserted the term of the agreement was through June 30, 1997 and shall only be extended by the written agreement of the parties.

During this process, Mr. Robbins met with at least some of the unit employees and told them of the Respondent's arrangements with the Union. Employees expressed dissatisfaction with both Nova and the Union in entering into the contract. The Respondent offered essentially unchallenged evidence that employees made it clear at that time and on an ongoing basis thereafter that they did not desire to be represented by the Union.

C. The Events of 1997

The contract was put in effect by agreement of the parties on a job by job basis and once in effect its terms were carried out for the remainder of its term. During the life of the contract employees voiced continuing dissatisfaction to the Respondent's agents both with the terms of the agreement and with Nova's recognizing the Union as the employees' representative. Nova was in turn dissatisfied with the Union's apparent failure to organize Nova's competition. Nova sent the Union a letter dated May 9, 1997, entitled, "Termination of Agreement" which informed the Union it was terminating the agreement effective June 30, 1997, and asserted that it had no obligation to bargain for a successor agreement. On May 12, 1997, the Union sent Nova a notice requesting bargaining for a new agreement. On May 14, 1997, the contractual trust funds sent Nova a letter discussing Nova's potential liability in withdrawing from the trust plans.

In this context a meeting was held on June 12, 1997. Although the meetings' specifics are in dispute, it is clear that an oral agreement to extend the contract for 60 days was reached. Thereafter on June 16, 1997, an additional meeting was held between Robbins and union officials but strong differences continued over various matters and the Union indicated there could be no agreement on the terms of a 60-day contract extension. Through correspondence thereafter Nova made it clear to the Union that after the 60-day extension had passed, it would not extend the agreement further or bargain further. Negotiations have not resumed, the terms and conditions of employment under the contract including trust fund payments have not continued and the Respondent continues to refuse to recognize the Union as the representative of its employees.

D. Analysis and Conclusions

1. The Arguments of the parties

The General Counsel argues that the parties entered into a relationship controlled by Section 9(a) of the Act predicated on recognition of the Union's majority support among Nova's unit employees by Nova's act of signing the 1995 collective-bargaining agreement and that the Respondent, as a matter of law, may not at this late date now assert either that the Union

did not have such majority employee support or that the parties did not intend enter into such a relationship at that time. The General Counsel in making this assertion relies on the recent Board case of *Oklahoma Installation Co.*, 325 NLRB 741 (1998), which holds that an assertion of majority status contained in the language of a collective-bargaining agreement will support a finding that the parties by virtue of the contract entered into a 9(a) relationship. The Respondent argues that the parties never clearly and explicitly intended to enter into a 9(a) relationship and that Nova was unaware that it was entering into such a relationship. Further, the Respondent argues that at no time, historically or currently, has the Union ever had the support of a majority of employees in the unit and that this was manifestly clear to all parties at all times and particularly known to Nova's President Robbins the individual who signed the contract on Nova's behalf. The General Counsel answers the Respondent's challenge to the majority representation status of the Union at the time the contract was entered into by arguing that Section 10(b) of the Act precludes inquiry into the extent of support for the Union among employees more than 6 months before the filing of charges citing *Expo Group*, 327 NLRB 413 (1999) and *Casale Industries*, 311 NLRB 951 (1993).

Given the 9(a) relationship of the Respondent and the Union created in 1995, argues the General Counsel, and specifically unlike the situation involving a non-majority relationship as allowed under Section 8(f) of the Act, there is a presumption of continuing majority support for the Union and the Respondent could not properly withdraw recognition from the Union. Thus, argues the government, the Respondent could not unilaterally end its relationship with the Union and discontinue bargaining for a new agreement at the expiration of the agreement in 1997.

The Respondent argues first that the Union had, in effect, agreed to terminate the relationship were it to fail to organize Nova's competitors and, when it failed to do so, Nova was privileged to rely on the promise. Thus, under this theory of the Respondent the Union is to be held to its agreement and conceptually may be regarded as having waived its right to continue representing employees or, alternatively, to have constructively withdrawn as the unit employees representative when it failed as promised to organize Nova's competition. Even were this not so, argues the Respondent, since the Union had never had, and at the time of the end of the contract still did not have, the support of a majority of employees in the unit and, since the Respondent well knew that fact, the Respondent was privileged to withdraw recognition and bargaining on that basis.

2. Did Nova have a good-faith doubt that the Union represented a majority of its unit employees at the time of the expiration of the contract?

For purposes of this threshold analysis I shall assume, without deciding, that the relationship between the parties under the 1995-1997 contract was established under Section 9(a) of the Act and was based upon union majority support among unit employees at the time the contract was signed. This being so, there is no dispute under settled Board law that the employer may not unilaterally withdraw recognition and refuse to meet

and bargain with the Union concerning a new contract unless and until it has a reasonable good-faith doubt that the Union enjoys majority support among unit employees. If an employer's doubts are insufficient, its withdrawal of recognition and refusal to bargain violates Section 8(a)(5) and (1) of the Act. If the employers' doubts are held reasonable, then such withdrawal and refusal is permissible and does not violate the Act.

The Board through the years has evolved a substantial body of case law respecting just what constitutes reasonable, good faith doubt in this setting. That body of law however was thrown into some disarray by the Supreme Court in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), 118 S.Ct. 818 (1998). The Court in *Allentown* accepted the Board's requirements respecting an employer's good-faith doubt but rejected the manner in which the Board made its factual determinations in regards thereto. Thus, the Court held at 118 S.Ct. 818, 829:

Of course the Board is entitled to be skeptical about the employer's claimed reliance on second-hand reports when the reporter has little basis for knowledge, or has some incentive to mislead. But that is a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions.

The same is true of the Board precedents holding that "an employee's statements of dissatisfaction with the quality of union representation may not be treated as opposition to union representation," and that an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union. 83 F.3d at 1488, citing *Destileria Serralles, Inc.*, 289 NLRB 51 (1988), enfd, 882 F.2d 19 (1st Cir. 1989), and *Middleboro Fire Apparatus, Inc.*, 234 NLRB 888, 894, enfd, 590 F.2d 4 (1st Cir. 1978). It is, of course, true that such statements are not clear evidence of an employee's opinion about the union -- and, if the Board's substantive standard required clear proof of employee disaffection, it might be proper to ignore such statements altogether. But that is not the standard, and, depending on the circumstances, the statements can unquestionably be probative to some degree of the employer's good faith reasonable doubt.

We conclude that the Board's "reasonable doubt" test for employer polls is facially rational and consistent with the Act. But the Board's factual finding that Allentown Mack Sales lacked such a doubt is not supported by substantial evidence on the record as a whole.

Given the explicit teachings of the Court, I shall seek to apply logic and draw sound inferences from all the circumstances in determining whether or not on the facts of this case, Nova's professed doubts concerning the Union's majority support among unit employees at the time bargaining was discontinued and recognition withdrawn were reasonable and in good faith and therefore sufficient to justify its actions.

The General Counsel argues strenuously that the testimony regarding Union support in the unit and the Respondent's be-

liefs respecting that support in the years 1994 and 1995 before the contract was signed are immaterial. He makes that argument on two grounds. First he argues that with the passage of time and turnover, these ancient times are simply not logically related to the critical post contract period. Second, the General Counsel argues that the contractual relationship—as is assumed to be true for purposes of this analysis was grounded in Section 9(a) of the Act and that fact in effect raises an irrebuttable presumption of majority support for any period of more than 6 months before the filing of the charges herein.

I accept the General Counsel's argument that the relevant time to test the Respondent's good-faith doubt is the period when the contract had expired, bargaining was broken off and recognition withdrawn. I also agree that earlier times must be discounted in considering the proffered basis for the Respondent's good-faith doubts. I find however that all evidence, including evidence from earlier times may be considered, if as no more than background, in evaluating the Respondent's asserted doubts. While the General Counsel is correct that Board law is that once a 9(a) relationship has been established, the Board will not look beyond the 6 months statute of limitations period set forth in Section 10(b) of the Act to find an improper minority recognition, this doctrine does not render improper an evaluation of the evidence during that period just as other background evidence occurring before a 10(b) unfair labor practice 6-month limitation is considered in other unfair labor practice cases.

The Respondent put into evidence the testimony of President Rodney Robbins, Superintendents Richard Eckroth and Fred Saldana, Foremen Donald Banks, Tom Leonardo, James Edward Hall, Paul Thomas, and Office Manager Marjorie Cardone Robbins. The foremen testified that they had opposed union representation and the 1995 contract in meetings with Robbins and the Union at the time the contract was entered into. They also testified with differing degrees of specificity that they had talked to other employees from time to time and, consistently through the entire history of Nova, there were no employees who expressed support for the Union nor a desire to be represented by it. The superintendents had broader contacts with employees and new hires and testified that the new employees generally had a history of employment in unorganized residential plumbing and were unfamiliar with and resistant to union representation and the payment of dues and initiation fees. Office Manager Robbins confirmed that the newer employees were reluctant to pay dues and resistant to joining the Union. All of these experiences in greater or lesser degree were communicated to President Robbins who testified they confirmed his own observations and belief throughout the period that the Union simply had no support among unit employee at anytime including the time following the expiration of the contract and the Respondent's withdrawal of recognition.

The General Counsel challenges the quality and efficacy of this testimony on several grounds. First he points out that much of what was described by the former Calta employees was simply the discontent of those Calta employees to one another through the entire period rather than the expressions of the significant number of employees who were later hired. Second the General Counsel argues that much of what was

reported by the superintendents and the foremen was dissatisfaction with contract terms and the costs of dues and initiation fees not direct evidence that employees did not seek to be represented by the Union. Finally the General Counsel notes that, with employee turnover and the increased complement of employees in the period after the contract expired, the number of employees expressing dissatisfaction and purportedly relied on by the Respondent represented a much smaller portion of employees than during the earlier period when the unit was smaller.

The General Counsel also argues that the real reason the Respondent withdrew recognition was its purported agreement with the Union that it did not have to bargain with the Union or sign a new contract with it unless and until the Union organized Nova's competition. Thus, argues the General Counsel, the Respondent's assertion it did not have to bargain because of a good-faith doubt regarding the Union's support among employees is an after the fact defense which should be either rejected out of hand or at the very least viewed skeptically.

The Respondent does not dispute that it believed itself justified in relying on its agreement with the Union that it need not bargain with the Union or sign a contract unless and until the Union organized Nova's competitors. Nova also argues however that at all times during the relationship with the Union commencing in 1994 to the time it withdrew recognition, it has no doubt that the Union was not supported by employees. Rather, argues the Respondent, it at all times considered the relationship between the Union and Nova - to the extent the statutory distinctions and their ramifications were understood - to be predicated on a nonmajority or 8(f) basis and that, in such circumstances, it was privileged to initially recognize the Union even though it did not represent a majority of unit employees and also to discontinue bargaining and withdraw recognition after the contract had expired. Thus, the Respondent argues the lack of majority was an ongoing belief that continued without interruption throughout the events under challenge. That belief informed the Respondent's actions, insofar as it understood the consequences of that fact bore on its bargaining relationship with the Union, and was and is not a last minute defense.

I have assumed for purposes of analysis that the General Counsel's cited cases are sufficient to have created a Section 9(a) relationship between the Union and the Respondent at the time the contract was entered into in 1995. That assumed fact creates a presumption that a majority of unit employees supported the Union at the time of the contract's signing and that a majority of employees continued to support the Union following the contract's expiration. The General Counsel seeks to rely on that fact and the argued insufficiency of the evidence offered by the Respondent in support of its asserted good-faith and reasonable belief that the Union did not represent a majority of employees to defeat the Respondent's defense to the withdrawal of recognition.

There are numerous earlier Board decisions in this area that might well be cited to metaphorically take the traveler tree by tree to the General Counsel's conclusion. The Supreme Court however in *Allentown*, as discussed supra, has instructed the Board and its judges to take better account of the forest and in a more global manner apply logic and sound inference from all

the circumstances in evaluating good-faith doubt issues. With that important and liberating instruction in mind, I find that the Respondent did in fact have at all material times a good faith doubt that the Union ever represented a majority of its unit employees and therefore was privileged to withdrawal recognition and cease bargaining with the Union upon the contract's expiration.

I reach this conclusion for several reasons. In setting forth the reasoning that follows, I emphasize that this is an unusual case where the support of the Union among unit employees derives essentially entirely from presumptions, and the Respondent's attempts to discount those presumptions are met by the limiting constraints of Section 10(b) of the Act. In other words, this is a case where the artificial constructs advanced by the General Counsel must be recognized for what they are. Initially, I credit the testimony offered by the Respondent respecting employee support for the Union and the reporting of supervisory information to President Robbins and I credit Robbins testimony that he in fact believed at all material times that the Union was without support let alone majority support in the unit. Secondly, I find that Robbins belief was reasonable as well as held in good faith because the older core of employees had early on and continually thereafter expressed opposition to the Union and a significant number of the new employees hired thereafter expressed disinclination to be represented by the Union. Finally I do not reject the Respondent's defense as a last minute defense raised to cloak a scheme to defeat the Union. Rather, I find that the Respondent was dealing with the Union knowing it did not represent its employees but its lack of concern for that fact was grounded in a belief that under Section 8(f) of the Act employee support for the Union was not a relevant factor and, further, that the employer was free to withdraw recognition and cease bargaining upon the 1995 contract's expiration.

I therefore find that the Respondent had a good faith and reasonable belief at the time that it withdrew recognition from the Union that it did not have the support of a majority of unit employees. I find further that the Respondent did not violate the Act in so withdrawing recognition and refusing to meet and

bargain with the Union. Similarly, it was privileged to discontinue contractually established payments.

3. Summary and conclusions

Having found that the Respondent through its President Robbins had a reasonable and good-faith doubt that the Union had the support of a majority of unit employees after the expiration of the contract, I find that the Respondent was privileged for that reason to cease paying into the trust funds provided by the expired contract, to cease bargaining with the Union and to withdraw and withhold recognition of the Union as the representative of its unit employees for purposes of collective bargaining. I find therefore that the Respondent has not violated the Act as alleged in the complaint. Accordingly, I find the allegations of the complaint are without merit and shall be dismissed.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record herein, I make the following conclusions of law.

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate the Act as alleged in the complaint.

ORDER

Based on the forgoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order.⁶

The complaint shall be and it hereby is dismissed in its entirety.

Dated, May 10, 1999 San Francisco, California

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.